No. 92-486

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
PETITIONERS

v.

EDGE BROADCASTING COMPANY,
T/A POWER 94

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. a. Respondent and amici claim that *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328 (1986), does not support our argument that Congress should be allowed to restrict lottery advertising by virtue of its power to ban lotteries altogether. Resp. Br. 14-16; National Ass'n of Broadcasters *et al.* (NAB) Amicus Br. 16-20; Association of National Advertisers *et al.* (ANA) Amicus Br. 11-17. In fact, *Posadas* makes that precise point. In the course of rejecting the claim that Puerto Rico's restrictions on advertising casino gambling were unconstitutional

under *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), and *Carey* v. *Population Servs. Int'l*, 431 U.S. 678 (1977), this Court in *Posadas* expressly concluded that "[i]n our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." 478 U.S. at 345-346. The Court elaborated on that point as follows, *id.* at 346-347 (citations and footnote omitted):

> Appellant also makes the related argument that, having chosen to legalize casino gambling for residents of Puerto Rico, the legislature is prohibited by the First Amendment from using restrictions on advertising to accomplish its goal of reducing demand for such gambling. We disagree. In our view, appellant has the argument backwards. As we noted in the preceding paragraph, it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising. It would surely be a Pyrrhic victory for casino owners such as appellant to gain recognition of a First Amendment right to advertise their casinos to the residents of Puerto Rico, only to thereby force the legislature into banning casino gambling by residents altogether. It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of ~~those who~~ would profit from such increased demand. Legislative

> regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand to legalization of the product or activity with restrictions on stimulation of its demand on the other hand. To rule out the latter, intermediate kind of response would require more than we find in the First Amendment.[1]

Moreover, the dissenters in *Posadas* specifically criticized the majority for endorsing a "greater includes the lesser" rationale.[2] And this Court summarized *Posadas* two Terms later, stating: "In *Posadas* the Court concluded that 'the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.'" *Meyer* v. *Grant*, 486 U.S. 414, 424

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[1] Respondent dismisses this Court's statements as "dicta" because they were made after this Court had concluded that Puerto Rico's restrictions satisfied the *Central Hudson* test. Resp. Br. 14. But the Court plainly understood the respondent in *Posadas* to be arguing that the restrictions at issue were in any event constitutionally defective under *Carey* and *Bigelow*. See 478 U.S. at 345-346. The Court's statements were made in the course of rejecting that argument.

[2] 478 U.S. at 354 n.4 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting) ("The Court reasons that because Puerto Rico could legitimately decide to prohibit casino gambling entirely, it may also take the 'less intrusive step' of legalizing casino gambling but restricting speech.") (quoting *Posadas*, 478 U.S. at 346); *id.* at 359 (Stevens, J., joined by Marshall & Blackmun, JJ., dissenting) ("The Court concludes that 'the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.'") (quoting *Posadas*, 478 U.S. at 345-346).

(1988) (quoting *Posadas*, 478 U.S. at 345-346). In sum, in *Posadas* the Court clearly adopted the "greater includes the lesser" rationale that we have urged in this case.[3]

The conclusion that Congress may restrict advertising related to lotteries is fully consistent with settled First Amendment doctrine. Historically, government could outlaw commercial speech (*i.e.*, speech proposing a commercial transaction) without violating the First Amendment.[4] Since 1976, commercial speech has received constitutional protection.[5] But this Court has made clear, before and after 1976, that government may completely ban advertising of illegal goods or services.[6] The reason is the govern-

[3] Amicus ANA contends that the "greater includes the lesser" rationale of *Posadas* does not apply here because Congress lacks the authority to outlaw state-run lotteries. ANA Br. 9-11. There is no merit to that claim. Congress clearly has the power to outlaw lotteries that affect interstate commerce. See, *e.g.*, *Champion* v. *Ames (No. 2)* (*Lottery Case*), 188 U.S. 321 (1903). Pet. Br. 25-26. The Tenth Amendment adds nothing to ANA's claim. See *South Carolina* v. *Baker*, 485 U.S. 505 (1988); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Compare *New York* v. *United States*, 112 S. Ct. 2408 (1992). Even under the more stringent Tenth Amendment test applied in *National League of Cities* v. *Usery*, 426 U.S. 833, 852 (1976), running a lottery is not a "traditional governmental function[]" and therefore is not immune from federal regulation.

[4] See *Breard* v. *Alexandria*, 341 U.S. 622 (1951); *Valentine* v. *Chrestensen*, 316 U.S. 52, 54 (1942) ("We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.").

[5] See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

[6] *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."); see also, *e.g.*, *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982); *Friedman* v. *Rogers*, 440 U.S. 1 (1979); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563-564 (1980); see *Lynch* v. *Blount*, 404 U.S. 1007 (1972), aff'g 330 F. Supp. 689 (S.D.N.Y. 1971) (three-judge court); *Outpost Dev. Corp.* v. *United States*, 414 U.S. 1105, aff'g 369 F. Supp. 399 (C.D. Cal. 1973) (three-judge court); *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178 (1948); *Public Clearing House* v. *Coyne*, 194 U.S. 497 (1904).

ment has a compelling interest in the prosecution of its criminal laws. See, *e.g.*, *Schall* v. *Martin*, 467 U.S. 253, 264 (1984) ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted.") (quoting *DeVeau* v. *Braisted*, 363 U.S. 144, 155 (1960)).

It is therefore clear that Congress and the States can outlaw gambling and advertising of illegal lotteries, as they have done for most of our history. Pet. Br. 4-9. Since Congress and the States can outlaw gambling and related advertising entirely, then it makes little sense to say they cannot engage in the lesser form of regulation at issue in this case. After all, outlawing activities such as gambling imposes considerable costs on society as well as lawbreakers. One cost is the birth of a black market for contraband goods and services (witness the emergence during Prohibition of organized crime) and the related costs that, unfortunately, all too often are associated with under-the-counter sales of contraband: corruption of law enforcement officials (to secure and maintain operating rights), and the commission of still further crimes (to ensure payment by customers, to maintain discipline within the

organization, and to prevent competition from the outside). The upshot is that enforcing vice laws can be so dear that society resorts to what Professor Epstein has aptly termed "damage control": legalization and regulation of disfavored activities, including restrictions on advertising. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 65 (1988).[7] Because activities like gambling are often legalized only as an accommodation to necessity, for First Amendment purposes lawful gambling should not be treated differently from its illegal cousin.

In addition, commercial speech enjoys only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Board of Trustees* v. *Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)). Accordingly, a restriction on commercial speech imposes costs on First Amendment values that are considerably less than those imposed by similar restrictions on political debate. As a result, just as society has long been free to ban the advertising of illegal activities, so, too, should it be able to forbid or restrict advertising of related vices, like gambling.

Respondent and amici maintain that our submission is a novel one, but it is they who seek to alter settled law. The principle that government can ban advertising of gambling is hardly novel. On the con-

[7] See, *e.g.*, 15 U.S.C. 1335 ("After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."); see generally *Posadas*, 478 U.S. at 346-347 & n.10 (collecting other similar examples).

trary, this Court endorsed that principle more than a century ago, *Ex parte Jackson*, 96 U.S. 727 (1878); *In re Rapier*, 143 U.S. 110 (1892); we have accepted it throughout our history, Pet. Br. 4-9; and the Court recently reaffirmed it in *Posadas*. In fact, the argument advanced by respondent and amici would effectively require this Court to overrule *Ex parte Jackson*, *In re Rapier*, and *Posadas* even though neither respondent nor amici have asked the Court to do so.[8]

Respondent and amici contend that we are asking this Court to jettison all First Amendment protection for commercial speech by holding that the legislature may forbid advertising about any item that may theoretically be outlawed. Resp. Br. 9-16; NAB Br. 5-8, 22-26; ANA Br. 11-18. They are wrong. Our submission is narrow and simple: Just as government can prohibit advertising of illegal activities, such as the sale of controlled substances, so, too, can government ban or restrict advertising of closely related products and activities, such as cigarettes, alcohol, prostitution, and gambling, that society may conclude are immoral or harmful, but sometimes chooses to legalize and regulate. Only that limited category of activities would be subject to the rule we have urged the Court to adopt. Respondent's and amici's apocalyptic cry that acceptance of our argument

[8] Amicus NAB claims that advertisements about the Virginia lottery could assist North Carolinians in deciding whether to adopt a North Carolina state lottery. NAB Br. 7. That argument proves too much, because it would deny government the ability to impose restrictions on the advertising of any product, even illegal ones such as cocaine or heroin, simply because such ads might have some bearing on the possible legalization of that item.

spells doom for the commercial speech doctrine is therefore overblown.

b. Since under *Posadas* Congress may restrict lottery advertising, the remaining question is whether the particular rules that Congress enacted by means of 18 U.S.C. 1304 and 1307 are rational. Contrary to respondent's claim, Resp. Br. 13-16, they surely are. Congress has chosen to ban advertising of lotteries in States that do not sponsor lotteries in order to support the belief held by those States that the public demand for gambling should be reduced. *Posadas* held that the government's interests in reducing public demand for gambling (of which lotteries are a form, Pet. Br. 22-23) is legitimate, and that restrictions on gambling advertising are rationally related to that interest. 478 U.S. at 341-342, 345 n.9; see also *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 569 (1980) ("There is an immediate connection between advertising and demand for electricity.").[9] Congress also has created

[9] Respondent concedes that 18 U.S.C. 1304 and 1307 serve legitimate interests. Nevertheless, amicus ANA claims that the only interest North Carolina has is in preventing its residents from traveling to Virginia to buy lottery tickets, and that *Bigelow* v. *Virginia*, *supra*, held that a State lacks a legitimate interest in barring residents from traveling to another State to conduct activity that is lawful within the latter State. ANA Br. 4-9, 18-19. It is not clear that that issue is properly before the Court, since amici cannot present additional questions not raised by the parties. *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 531-532 n.13 (1979). In any event, ANA's argument lacks merit, for several reasons.

To begin with, ANA errs in relying on *Bigelow*. This Court distinguished *Bigelow* in *Posadas* on the ground that in *Bigelow* "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State." 478 U.S. at 345. By contrast, gambling is not a constitutionally protected activity. Pet. Br. 23; *Posadas*, 478 U.S. at 345. In addition, North Carolina could reasonably believe that the conduct of its citizens in participating in the Virginia Lottery could have harmful consequences at home in North Carolina. North Carolina could reasonably find that gambling has a "corrosive effect * * * on family and business obligations," Epstein, 102 Harv. L. Rev. at 65; that it can impoverish residents, perhaps even bankrupting the most needy; and that it can burden residents who do not gamble, but who must pay the taxes necessary to support residents who may be impoverished by spending all their resources on games of chance. In sum, North Carolina could reasonably believe that even out-of-state gambling by its residents has harmful effects in North Carolina. Finally, Congress can regulate the private use of the facilities of interstate commerce facilities to help States enforce their policies. See *Public Clearing House* v. *Coyne*, 194 U.S. at 507; *In re Rapier*, 143 U.S. at 134-135; *Ex parte Jackson*, 96 U.S. at 736-737.

an exception for stations licensed to a State with a state-operated lottery in order to accommodate the interests of those States. That is plainly legitimate. Furthermore, the means that Congress has chosen to achieve its dual ends—*i.e.*, using a geographic classification that draws a distinction based on whether the State to which a broadcaster is licensed runs a lottery—is a rational way to accommodate the States' differing interests. Accordingly, since the ends of this scheme are legitimate, and the means to achieve those ends are not arbitrary, the congressional scheme is constitutional.

2. a. Respondent argues that 18 U.S.C. 1304 and 1307 are unconstitutional because they do not "directly advance" Congress's goals under *Central Hudson*. More specifically, respondent contends that be-

cause "the North Carolinians in WMKY's broadcast area are saturated with lottery information and advertising from Virginia media," the advertising restrictions imposed by 18 U.S.C. 1304 and 1307 are futile as applied to WMYK. Resp. Br. 27; NAB Br. 11-15; ANA Br. 19-20. That argument is flawed in several respects.

First, respondent has ignored the fact that Congress had competing goals in mind. Congress enacted the exemption in 18 U.S.C. 1307 in order "to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States," S. Rep. No. 1404, 93d Cong., 2d Sess. 2 (1974), by "making a reasonable balance between Federal and State interests in this area," including "the consideration and protection of the policies and the interests of the States which do not provide for such lotteries," H.R. Rep. No. 1517, 93d Cong., 2d Sess. 5 (1974). Any effort to advance Virginia's interest in promoting the Virginia Lottery to North Carolina residents adversely affects North Carolina's interest in discouraging such promotion.[10]

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[10] For that reason, it is apparent that what respondent ultimately is challenging is not the efficacy of this scheme. Respondent's submission instead is that Congress lacks power under the First Amendment to advance competing State interests in one regulatory scheme. But that claim bears on the first prong of the *Central Hudson* test (*i.e.*, whether the government's interests are "substantial"), and not on the prong at issue here (*i.e.*, whether the regulation "directly advances" those interests). Equally important, nothing in the Court's decisions would support the argument that Congress cannot strive simultaneously to advance the interests of the States that do and do not sponsor state lotteries. Indeed, respondent makes no such argument.

Second, respondent mistakenly assumes that Congress's goal was to keep North Carolinians within WMYK's broadcast radius ignorant of the Virginia Lottery, and maintains that, because 18 U.S.C. 1304 and 1307 do not (and perhaps cannot) achieve that goal, those laws do not "directly advance" Congress's end. But Congress did not adopt those laws to keep North Carolina residents ignorant of the Virginia Lottery for ignorance's sake. Instead, Congress sought to accommodate the competing interests of the States in discouraging and encouraging *public participation in state-run lotteries.* Thus, the relevant question is not whether 18 U.S.C. 1304 and 1307 keep WMYK's listeners ignorant about the Virginia Lottery; it is whether those statutes help reduce the public demand for gambling by North Carolinans. The evidence cited by respondent does not, to paraphrase *Posadas*, undermine the "reasonable" belief that "advertising of lottery gambling aimed at residents of North Carolina would serve to increase the demand for the product advertised." 478 U.S. at 342.

Third, respondent misunderstands how the "directly advance[s]" test should be applied. We do not argue that respondent should not be free to mount an as-applied challenge to 18 U.S.C. 1304 and 1307 under the First Amendment. We just disagree with respondent about how an as-applied challenge must be conducted. *Posadas* concluded that the "directly advances" prong of the *Central Hudson* standard (together with the requirement that a regulation be "no more extensive than necessary") "basically involve a consideration of the 'fit' between the legislatures' ends and the means chosen to accomplish those ends." 478 U.S. at 341. It therefore is reasonable to

refer to equal protection doctrine for guidance in performing the proper analysis, as we explained in our opening brief (at 35-36), since equal protection analysis also involves scrutiny of "means" and "ends." When considered in that manner, 18 U.S.C. 1304 and 1307 are constitutional. This program fits together nicely. It reduces the amount of lottery advertising received by citizens of non-lottery States and thereby serves the interest of those States in reducing demand for lottery tickets by their citizens, while also permitting advertising of state-run lotteries in States that sponsor them, thereby serving the interest of those States in encouraging people to buy their lottery tickets.

To be sure, in one sense this scheme may be underinclusive since it does not prevent all Virginia Lottery advertising from reaching North Carolina residents. But that is due to the laws of physics, not man, since broadcast signals cross state lines. In any event, an underinclusive scheme is not unconstitutional, as this Court concluded in *Posadas*, 478 U.S. at 342, and *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 512 (1981) (plurality opinion of White, J.); *id.* at 541 (opinion of Stevens, J., concurring in part and dissenting in part).

Respondent seems to concede that this program is generally a rational one. Instead, respondent claims that Sections 1304 and 1307 are unconstitutional as applied to WMYK. Respondent further argues that in evaluating its as-applied claim, this Court must focus on the effect of the statute on WMYK alone, or else there is no difference between an as-applied and a facial challenge to a statute. Resp. Br. 16-28. Respondent, however, has confused standing requirements with the elements of its claim. Respondent has standing to challenge the constitutionality of 18

U.S.C. 1304 and 1307 insofar as those laws adversely affect it. Respondent cannot, however, transform a right to challenge those statutes into an immunity from their application on the ground that they are ineffective when applied to him. This Court has never analyzed the direct advancement prong of the *Central Hudson* test in that manner, and respondent has offered no good reason to start now.

In fact, *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989), is to the contrary, as we explained in our opening brief (at 44-45). *Ward* ruled that the validity of regulation of the "time, place, and manner" of speech "depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." 491 U.S. at 801. Only one week later, *Fox* concluded that the *Central Hudson* commercial speech test is "substantially similar" to the "time, place, and manner" test, which had been discussed in *Ward*. 492 U.S. at 477. *Fox* and *Ward* foreclose the claim that this Court should look solely to the impact of 18 U.S.C. 1304 and 1307 on WMYK to decide whether those laws directly advance Congress's interests. The direct advancement test thus looks to the whole picture—to the effect of a statute on every affected party—and asks whether that law, as applied to all parties, directly advances Congress's goals.

In any event, Sections 1304 and 1307 directly advance Congress's goals even when viewed just in connection with WMYK. The district court found that Sections 1304 and 1307 *do* slightly reduce the amount of Virginia Lottery advertising heard by North Carolinians. Pet. App. 23a ("It is probably true that a relatively small number of North Car-

olina listeners who listen only or mainly to Power 94 may hear significantly less lottery advertising"; "other North Carolinians may hear slightly less lottery advertising because they occasionally listen to Power 94."). Unless Virginia Lottery advertisements are ineffective, or unless no North Carolinians actually listen to WMYK—contentions that respondent and amici quite understandably do not advance—application of the advertising ban to WMYK reduces the amount of Virginia Lottery advertising generally broadcast to residents of North Carolina and thus reduces the demand for lottery tickets by such persons, thereby "directly advanc[ing]" North Carolina's interest.[11]

b. The last prong of the *Central Hudson* test requires that a regulation be no more extensive than necessary to advance the government's interests. 447 U.S. at 566; *Fox*, 492 U.S. at 475-481. Respondent does not claim that 18 U.S.C. 1304 and 1307 fail

[11] Respondent would force the courts to engage in unguided speculation regarding the effects of a law. Under respondent's theory, courts must engage in an undirected line-drawing exercise in order to determine whether a law persuades a sufficient number of residents, for a sufficient time, to reduce demand for gambling in a sufficient amount to be worth the cost of limiting advertising. Neither the text and history of, nor the values promoted by, the First Amendment supplies a principled means of gauging where that line should be drawn, and respondent provides no non-arbitrary ground for deciding when an effect ceases to be "speculative" and suddenly becomes "proven." Whether a statute achieves its intended effect and, if so, whether the costs are "worth it" are judgments better made by legislatures than by courts. Cf. *Gregg* v. *Georgia*, 428 U.S. 153, 186 (1976) (lead opinion) (the deterrent effect of criminal laws is better determined by legislatures than by courts).

that prong of the *Central Hudson* test. Amici, however, advance such an argument; they claim that those laws are unconstitutional since they are based entirely on the State to which a broadcaster is licensed and do not take into account the State(s) where an advertisement may be received. NAB Br. 12-13; ANA Br. 20.[12]

Congress could have designed the statutory scheme differently. Congress could have permitted a radio station to broadcast lottery advertising if the station's audience included residents of a State with a state lottery (thereby favoring States such as Virginia that operate lotteries), or Congress could have banned such advertising if the station's audience included residents of a State without a state lottery (thereby favoring States such as North Carolina that do not).[13]

[12] Amicus ANA argues that WMYK is actually licensed to both North Carolina and Virginia. ANA Br. 23-25. That claim is meritless. Not even respondent claims that it is licensed to Virginia. The complaint filed by respondent, the stipulation of facts between petitioners and respondent, the district court decision, the court of appeals decision, and the brief filed by respondent in this Court all make clear that WMYK is licensed to Elizabeth City, North Carolina. See J.A. 9 (amended complaint: "POWER 94 is licensed by the FCC to Elizabeth City, North Carolina"); J.A. 19 (stipulation: "WMYK is licensed by the FCC to Elizabeth City, North Carolina"); Pet. App. 10a (district court decision: "That station is licensed * * * to Elizabeth City, North Carolina."); Pet. App. 2a (court of appeals decision: "Power 94 is licensed by the Federal Communications Commission to Elizabeth City, North Carolina"); Resp. Br. 2. That also is the understanding of the FCC, which granted respondent the license to operate WMYK.

[13] In fact, the difficulty of choosing one state policy over another under such a scenario shows the wisdom of Congress's chosen approach of following the policy of the State of license.

But the fact that Congress could have drawn a different line scarcely means that the one Congress drew is unreasonable, which is what respondent and amici must prove. See *Fox*, 492 U.S. at 480. In fact, that line is consistent with the traditional rule that a State has power to regulate businesses within the State even if the firm's customers reside elsewhere. This regulatory scheme may put WMYK in a competitive disadvantage in regard to nearby Virginia radio stations, but that consequence is not an impermissible way to advance Congress's federalism interests, nor does it trench on values that the First Amendment was designed to protect.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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